DISTRICT OF COLUMBIA
DOH Office of Adjudication and Hearings
825 North Capitol Street N.E., Suite 5100
Washington D.C. 20002

DISTRICT OF COLUMBIA DEPARTMENT OF HEALTH Petitioner, v. U & T GROCERY & GAS and GORDON SARYI and VICTOR MBANEFO Respondents	Case Nos.: I-00-30102 I-00-30108

FINAL ORDER

I. Introduction and Background

On May 26, 2000, the Government served a Notice of Infraction (No. 00-30102) charging Respondents, U & T Grocery & Gas, Gordon Saryi and Victor Mbanefo, with an alleged violation of D.C. Code § 47-2827(b) for operating a food store without a current food product license. The violation allegedly occurred on May 15, 2000. The Notice of Infraction sought a fine of $500.00 pursuant to 16 DCMR § 3214.1(w).

Respondents did not file an answer to the Notice of Infraction within the required twenty days after service (fifteen days plus five additional days for service by mail pursuant to D.C. Code § 6-2715). Accordingly, on June 22, 2000, this administrative court found Respondents in default and assessed the statutory penalty of $500.00 required by D.C. Code § 6-2712(e)-(f). The Government then served a second Notice of Infraction (00-30108) on the Respondents on July 7, 2000. Respondents also failed to answer the second Notice within twenty days of service. Accordingly, on November 9, 2000, this administrative court issued a Final Notice of Default and assessed total statutory penalties of $1,000.00 pursuant to D.C. Code § 6-2712(f). The Final

Notice of Default also set December 13, 2000 as the date for the *ex parte* proof hearing required by D.C. Code § 6-2713(b), and afforded Respondents a final opportunity to appear at the hearing to contest liability, fines, penalties or fees. Enclosed with the Final Notice of Default were copies of both the first and the second Notices of Infraction.

For the reasons discussed below, the Government failed to meet its burden of proof at the *ex parte* proof hearing, and consequently, the charged infraction must be dismissed.

II. Discussion

A. The *Ex Parte* Proof Hearing Pursuant to D.C. Code § 6-2713(b)

Prior to the December 13, 2000 hearing, the Government submitted two pre-filed exhibits in support of its case. These were the first and second Notices of Infraction (PX-100 and PX-100A). At the hearing, the Government also offered PX-101, a small unsigned scrap of paper that appears to list two food items and the dollar amounts of "$2.50" and "$4.38." The paper scrap also contained the words "Lowest Price Gas Station" (which is not named as a party in this case), an address of "420 Rhode Island Ave, NE", and a date of "5-15-00". A copy of the exhibit is attached to this Order.

Ms. Jacqueline Coleman, the supervisory inspector who signed and issued the Notices of Infraction giving rise to this matter, appeared with counsel and gave testimony on behalf of the Government. Ms. Coleman sponsored Exhibits PX-100 and PX-100A, which contained Certificates of Service and charging information sufficient to meet the requirements of the Constitution's Due Process Clause and applicable statutes. D.C. Code §§ 1509(a); 6-2711; 6-2715; *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 800 (1983*); McCaskill v. District of*

Columbia Dep't of Employment Services, 572 A.2d 443, 445 (D.C. 1990); *Carroll v. District of Columbia Dep't of Employment Services*, 487 A.2d 622, 624 (D.C. 1985). The record shows that the notices and orders issued by the administrative court were also properly served, having been sent to Respondents' last known business address. D.C. Code § 6-2715. Respondents did not appear at the hearing, nor did they submit any evidence.

B. The Government's Failure of Proof at the Hearing

Despite the adequacy of service and the absence of an appearance by the Respondents at the scheduled hearing, the Government failed to meet its burden of proof on the sole charge in this case of operating without a food product license in violation of D.C. Code § 47-2827(b). The charge therefore must be dismissed under D.C. Code § 6-2713(c). The Government's witness, Ms. Coleman, testified that she had personally suspended Respondents' license in February 2000 and that she believed the Respondents continued to sell food products subsequent to that suspension. Ms. Coleman readily admitted that she had no personal knowledge of the alleged food sale that formed the basis for the charge at issue in this case. She testified that a staff inspector with personal knowledge of the underlying facts had come to the hearing room earlier in the day, then elected to leave before this case was called.

The only evidence offered by the Government to prove the facts supporting its charge was PX-101, the handwritten scrap of paper containing the listed skeletal information described above. Under further examination, Ms. Coleman admitted that she: 1) had no personal knowledge of PX-101 or by whom or when it was written; 2) did not recognize the handwriting as that of the staff inspector who had left the hearing room and who she believed had witnessed Respondents' alleged violation; and 3) knew nothing about the contents of PX-101 other than the fact that the staff

inspector had given it to her at a time prior to his exiting the hearing room. Ms. Coleman rightly admitted that she could do nothing but guess as to the meaning of the scrap of paper (PX-101), as she had not discussed it with the then-absent staff inspector whom had given it to her.

At the Government's request, the administrative court held the record open an additional seven (7) days after the hearing to allow counsel an opportunity to cure the defects in the Government's case by authenticating PX-101 and discussing its relevance with respect to the charged violation. The administrative court explained that, in light of Respondents' failure to appear, a written submission would be accepted and no further appearance would be required of the Government's counsel or its witness. Despite this accommodation, the Government failed to offer any proof supplementing the record or otherwise demonstrating that PX-101 was in fact a list of food that Respondents sold unlawfully to a District of Columbia inspector on the date at issue. Because the Government provided no testimony as to what actually happened at the time of the alleged sale, and no authentication[1] or properly founded explanation regarding Exhibit PX-101 (so that the administrative court is not left guessing as to who wrote it and what it means), the

[1] Authenticity must be demonstrated by the party offering a document into evidence. The requirement of authentication is a special aspect of relevancy stemming from the fact that a document's connection to a case is ordinarily dependent on its association with a particular person or event. *See e.g.*, *Banks v. United States*, 359 A.2d 8 (D.C. 1976) ("[A document's] genuineness must be shown independently before it is accepted as proof . . . its reliability is not automatically assumed."); E. CLEARY, MCCORMICK ON EVIDENCE § 219 at 686 (3rd ed. 1984); Fed. R. Evid. 901, advisory committee notes. Under this rule, PX 101 is relevant only if it is in fact a list of items that was prepared by a government inspector or other person with personal knowledge of the alleged unlawful food sale charged in this case. If it was prepared by any other person, or for any other reason, then it is neither relevant nor admissible. D.C. Code § 1-1509(b). The authentication requirement is rarely a litigation obstacle because parties will generally avoid the use of documents that cannot be explained or are not self-authenticating as a matter of law. *See generally, e.g.,* Super. Ct. Civ. R. 44(a). If authentication were not an evidentiary requirement, the public's confidence in our system's truth-finding capability would erode rapidly, and cryptic documents such as the one in issue would be frequently misused or misconstrued. *See, Goldman v. Summerfield,* 214 F.2d 858, 859 (D.C. Cir. 1954); *cf.,* W. MILLER, A CANTICLE FOR LIEBOWITZ, Chap. 2 (Bantam ed. 1997) (1959).

Government failed to meet its burden of proof on the charge as alleged. The administrative court therefore has no option but to find Respondents not liable.[2]

This administrative court will not fine a citizen $500.00 when the Government is unwilling or unable to offer proof of liability. The Government's witness, Ms. Coleman, rightly stated that she would not and could not guess about the meaning of PX-101. Neither will I.

Because the Government bears the burden of proof in this case pursuant to D.C. Code § 6-2713(a), and because the Government failed to provide sufficient evidence to meet this burden, I find as a matter of fact, and conclude as a matter of law, that the Government has failed to meet its burden to prove Respondents liable by a preponderance of the evidence. Consequently, the charged infraction shall be dismissed. D.C. Code § 6-2713(c).

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[2] It is important to note that the Government's case *did not* fail because of a hearsay problem with its evidence. *See* e.g., Fed. R. Evid. Rule 802. Under the District of Columbia Administrative Procedure Act, this administrative court regularly admits credible relevant hearsay evidence. D.C. Code § 1-1509. Here, the Government was even expressly invited to supplement the record with such evidence to cure the defects in its case. Instead, the Government's case failed because it offered no witness with knowledge (direct or hearsay) of the facts required to prove its case (that an unlawful food sale actually occurred at the time and place in issue). I assume that the Government speculates that PX-101 is an inventory of items sold in alleged violation of D.C. Code § 47-2827(b) as was charged. But the law does not permit the administrative court to fine the Respondents $500.00 based on an assumption and the Government's speculation. The document could be a food sale inventory, but from a different store than the one charged in this case, or it could be a list prepared by someone on the date of the hearing to try to remember certain facts, or it could even be someone's shopping list. The point is that the proponent of a documentary exhibit must be able to show, based on something other than a guess, what connection that document has to the case, both in terms of its authorship (authenticity) and in what it says (relevance). *See,* e.g., Fed. R. Evid. 401, 602, and 901.

Accordingly, it is, this _____ day of _____, 2001:

ORDERED, that the Government has failed to meet its statutory burden of proof and Respondents are therefore not liable for the charged infraction and such infraction shall be **DISMISSED** with prejudice, and it is further

ORDERED, that Respondents U & T Grocery & Gas, Gordon Saryi, and Victor Mbanefo remain jointly and severally liable for the statutory penalties totaling **ONE THOUSAND DOLLARS ($1,000.00)** that were previously assessed pursuant to D.C. Code § 6-2704(a)(2) and § 6-2712(f).

ORDERED, that Respondents U & T Grocery & Gas, Gordon Saryi, and Victor Mbanefo shall cause to be remitted a single payment totaling **ONE THOUSAND DOLLARS ($1,000.00)** in accordance with the attached instructions within twenty (20) calendar days of the date of mailing of this Order (fifteen (15) calendar days plus five (5) days for service by mail pursuant to D.C. Code §6-2715). A failure to comply with the attached payment instructions and to remit a payment within the time specified will authorize the imposition of additional sanctions, including the suspension of Respondents' license or permit pursuant to D.C. Code § 6-2713(f).

/s/ 4/6/01

Paul Klein
Chief Administrative Law Judge